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Supreme Court, U.S.
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No. 95-456

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

I. THE AUTHORITY HAS NOT DISPROVED THE EXISTENCE OF THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S DECISION AND HAS NOT PRESENTED ANY REASONS FOR DENYING CERTIORARI.

A. Introduction

In their Petition for Certiorari, the Ristows have shown the existence of a genuine conflict between the Fourth Circuit's analysis of the state treasury factor and the standards for evaluating Eleventh Amendment questions set forth in Hess v. Port Authority Trans-Hudson Corp., 513, U.S. _____, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) which clearly meets the criteria for Supreme Court review under Rule 10.1. The Authority's Brief has done nothing to disprove the existence of this conflict, and its arguments fail to show why certiorari is not appropriate. The Ristows will now reply to those sections of the Authori-

ty's Brief which are believed to require discussion at this point.

B. Reply to Statement of the Case Discussion

On page 2 of its Brief, the Authority claims the Ristows description of the Ports Authority is scanty and argumentative. It then sets forth numerous statutory sections on pages 3 through 8 in an attempt to show the Authority's alleged lack of autonomy from the State.

Recognizing that this is a Petition and not a brief on the merits, the Ristows have adequately described the Authority on pages 4 and 5 of their Petition and have furnished the Court with applicable statutory provisions concerning the Authority in Section E of their Appendix. The Ristows have stated the Authority has "highly autonomous pow-

ers" and believe the applicable statutes cited support this proposition. (Petition, p. 4)

C. Reply to Authority's Dignity Arguments

1. General Dignity Discussion

The Authority contends on pages 10 and 11 of its Brief that it meets the two pronged test of state dignity and solvency for Eleventh Amendment immunity set forth in the majority's opinion in Hess. Actually, the Authority satisfies neither prong of the test. Even though the Fourth Circuit did not employ dignity considerations as a basis for its decision and only briefly mentioned dignity, the Authority attempts to find alternative grounds of support since the Fourth Circuit's decision on financial grounds so obviously conflicts with

Hess. (See Petition at p. 36-52)

The Court's dignity discussion in Hess offers no support for the Authority's position. On pages 255 through 257 of the Hess opinion, Justice Ginsburg discussed dignity as a relevant consideration in an Eleventh Amendment analysis citing a passage from Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. ____, 113 S. Ct. 684, 121 L. Ed. 2d 605, 614 (1993).

Because Hess involved an interstate compact entity which occupies ". . . a significantly different position in our federal system than do the States themselves..."[1] and there is a rebuttable presumption against Eleventh Amendment

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[1] Hess, 130 L. Ed. 2d at 255.

immunity for interstate compact entities[2], the Court obviously felt compelled to justify the presumption by addressing the dignity issue and the special place occupied by bi-state entities. However, once it found the indicators of immunity under the bi-state presumption were inconclusive, the Supreme Court then emphasized the treasury factor. Hess, 130 L. Ed. 2d at 258-263. Since a presumption against immunity is not involved herein, the analysis is properly directed at the state treasury factor.

When looking at the dignity considerations, it is also extremely important to remember that in the Puerto Rico

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2 Hess, 130 L. Ed. 2d at 257.

Aqueduct case the Supreme Court granted certiorari to resolve the issue as to whether a district court order denying an Eleventh Amendment immunity claim may be immediately appealed under the collateral order doctrine. Puerto Rico Aqueduct, 121 L. Ed 2d at 610. The Court held that States and entities claiming to be arms of the State may take advantage of the collateral order doctrine to immediately appeal an order denying Eleventh Amendment immunity. Puerto Rico Aqueduct, 121 L. Ed. 2d at 615. Thus, the Court faced a separate procedural question concerning the Eleventh Amendment which was independent of the substantive issue concerning the Authority's actual entitlement to immunity. Such procedural concern is not present herein.

2. State Forum Considerations and Dignity

On pages 11 through 13 of its Brief, the Ports Authority contends the denial of Eleventh Amendment immunity would offend the dignity of South Carolina because the forum selection clause, S.C. Code Ann., Sec. 15-78-100(b), would be violated and the state forum bypassed. Essentially, the Ports Authority is proposing that the South Carolina General Assembly's forum choice should conclusively resolve the dignity issue in their favor. Such argument, however, overlooks the fact that questions of Eleventh Amendment immunity are ultimately governed by federal law. See Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F. 2d 456, 459-460 (4th Cir. 1987) and Blake v. Kline, 612 F. 2d 718, 722 (3rd Cir.

1979), cert. den. 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980). Eleventh Amendment questions simply cannot be decided on the basis of a state's own legislative choice. [3]

The Hess decision has also removed any doubt as to the existence of a state forum being a relevent factor in an Eleventh Amendment analysis. In Hess, the Court noted the existence of a state court forum, but attached no significance to the same. Hess, 130 L. Ed. 2d at 252.

3. Structural Considerations and Dignity

On pages 13 through 15 of its Brief, the Ports Authority recites the struct-

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[3] The Authority's argument also ignores the fact that the Ristows' alternative claim is for breach of contract. See Complaint at App. F18-22.

tural considerations cited in Hess to show why suit in federal court is not an affront to a bi-state entity thereby supporting a presumption against immunity. The Authority then discusses the differences between the two entities which it believes should convince the Court that the Ristows' action offends the State's dignity. Authority's Brief at p. 15-17. While the structural considerations regarding the creation of an interstate compact entity are not present in the case at bar, other structural considerations pertaining to the Authority provide compelling reasons as to why a federal court suit against the Authority would not offend South Carolina's dignity.

On page 16, the Authority claims the factors indicating immunity in Hess were

insufficient to overcome the presumption. The Ristows would again point out that Hess was not decided on the basis of the presumption due to the inconclusiveness of the indicators. Hess, 130 L. Ed. 2d at 258. Once it determined the indicators were inconclusive, the Court essentially disregarded the presumption and moved to general immunity grounds. Hess, 130 L. Ed. 2d at 258.

The most convincing structural consideration showing the Ristows' suit to be inoffensive to the State's dignity is the Authority's autonomy which is discussed at pages 61-63 of their Petition. Other structural features, revealed by statutes allowing it to deal with the U. S. Government and entities located in Georgia, demonstrate that the

Authority was designed to participate in the realm of foreign and interstate commerce.

Sec. 54-3-120 of the South Carolina Code Ann. gives the Authority jurisdiction over the waters and shores of the harbors and seaports within the State. (App. E6) Sec. 54-3-200 permits the Authority to operate railroads, and Sec. 54-3-210 allows the Authority to make agreements with railroad employees in accordance with the federal Railway Labor Act. (App. E25-27) Navigable waters and railroads, of course, fall within the domain of interstate commerce.

The following provisions illustrate the Ports Authority's extensive dealing with the federal government. Sec. 54-3-

130(4) indicates one of the Authority's purposes as being to cooperate with the federal government in developing and maintaining the seaports and harbors. (App. E8) Sec. 54-3-130(6) states that another purpose is to act as agent for the United States and its agencies. (App. E9) Sec. 54-3-190 empowers the Authority to transfer property to the United States as well as to assist the federal government with property acquisitions. (App. E22-25) The Authority may apply to the Foreign-Trade Zones Board to establish and maintain such trade zones under Sec. 54-3-230. (App. E27-29)

Pursuant to Sec. 54-3-130(7), the Ports Authority may cooperate and act as co-assurer with Augusta, Georgia and the Georgia State Ports Authority regarding

the Savannah River Project thereby giving the Authority a bi-state characteristic. (App. E9-10) Finally, Sec. 54-3-140(6) permits the Ports Authority to establish offices outside the State. (App. E13) The Authority was clearly designed to participate in the stream of interstate commerce and interact with the federal government. Thus, the dignity of the State of South Carolina would not be offended by allowing the Authority to be sued in federal courts.

D. Reply to Authority's Purse Arguments

On pages 17 through 19 of its Brief, the Authority argues that South Carolina's purse is vulnerable to a judgment in the Ristows' favor. Underlying the Authority's purse contentions is the now discredited broad financial/symbiotic

relationship rationale. Such reasoning simply ignores the practical and legal separation of the Authority's assets from those of the State as well as the Court's focus in Hess on the practical and legal bearing of indebtedness should expenditures exceed receipts. Hess, 130 L. Ed. 2d at 262. The test is clearly not whether the state has made any contributions to the entity or whether the state has access to its surplus. Since the Ristows have covered these matters on pages 29 through 49 of their Petition, they would refer the Court to such discussion.

E. Reply to Authority's Argument that the Fourth Circuit Decision Is Harmonious with Hess.

The Authority contends on pages 19 and 20 of its Brief that the Fourth Circuit's decision herein is harmonious

with Hess. The Ristows have extensively detailed why these decisions directly conflict and would direct the Court's attention to pages 36 through 52 of their Petition.

F. Reply to "Important Differences" Discussed by the Authority

On pages 20 through 24 of its Brief, the Authority sets forth numerous differences between itself and PATH which it believes are significant. In Section 4a, the Authority notes that it is a single state entity while PATH is a bi-state entity. This "important" difference is not relevant since the Court decided Hess not on grounds particular to bi-state entities but on the basis of general immunity considerations. Hess, 130 L. Ed. 2d at 259-263. (See Petition at p. 23-25)

In Section 4b, the Authority notes

that Hess involved a FELA claim whereas the Ristows' action is a state law claim. The Ristows believe the particular nature of the claim was not a significant factor in Hess, and thus this distinction is immaterial.

The Ports Authority in Section 4c states that Hess created a different test for bi-state entities, i.e. a presumption against immunity unless there is a good reason to believe the States structured it to enjoy immunity and Congress concurred. Such presumption and its test are not applicable to the Authority, and the Ristows have never claimed otherwise. The Court's ultimate decision in Hess on general immunity grounds and the inapplicability of the presumption to this case render the Authority's comments in Section 4c ir-

relevant.

In Section 4d, the Ports Authority again recites a list of financial differences between it and the Port Authority Trans-Hudson which are immaterial in light of the actual financial analysis approach set forth in Hess. (See Petition at p. 29-36)

The Authority's statements about the issuance of bonds and the like is an obvious attempt to distract the Court from the absence of any continuing funding obligation on the part of the State as well as Hess's pronouncement about the proper focus of the financial analysis being on the entity's losses and debts and state responsibility for the same. The State has not made an annual appropriation for the operation of the Authority since 1959. (App. A. 13)

With respect to the Authority's comments regarding control in Section 4e, the Ristows would refer the Court to their discussion of this matter on pages 59 through 63 of their Petition. Finally, in Section 4f, the Authority discusses waiver. Throughout this litigation, however, the Ristows have argued that the Ports Authority is not entitled to immunity; they have not claimed any waiver of the same. Furthermore, Hess was not decided on the basis of waiver. Thus, any discussion of waiver is irrelevant.

G. Reply to Authority's Solvency Factor Arguments

The Authority's expansive view of the state treasury presented on pages 24 through 26 ignores the test in Hess which is focused on the practical and

legal bearing of an entity's indebtedness should expenditures exceed receipts and not on a state's voluntary contributions and access to surplus. Such argument is also inconsistent with the practical and legal separation of the Authority's assets from those of the State.

Conclusion

In their petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case. They have also shown that the Ports Authority is not entitled to Eleventh Amendment immunity since the state treasury is not practically obligated to bear a judgment in their favor. For the reasons recited in their petition and this brief, the Ristows' petition for

certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

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